FILED
JAN 28 1998
CLERK

No. 97-888

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
MICHAEL C. LIDDELL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM DOUTHIT
P.O. Box 6961
Chesterfield, MO 63006-6961
Attorney for Respondents Michael Liddell, et al.

WILLIAM L. TAYLOR *
DIANNE M. PICHE
LAW OFFICES OF
WILLIAM L. TAYLOR
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 659-5565

MICHAEL A. MIDDLETON
1901 Fairview Road
Columbia, MO 65203
(573) 882-3423
Attorneys for Respondents Earline Caldwell, et al., and The National Association for the Advancement of Colored People

* Counsel of Record

January 28, 1998

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Earline Caldwell, et al., the National Association for the Advancement of Colored People, and Michael Liddell, et al., representing certified classes of school children in metropolitan St. Louis, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. That opinion is reported at 126 F.3d 1049 (8th Cir. 1997).

STATEMENT OF THE CASE

A complete and accurate understanding of the procedural history and background of this case, important to the Court's consideration of the pending petition for certiorari, has not been furnished by petitioners, the State of Missouri, et al. ("State"), defendants below. In an apparent attempt to capture the Court's attention, petitioners seek to paint a picture of foot-dragging and delay by the

courts below and a court-mandated settlement negotiation corrupted by the bias of the settlement coordinator (Dr. William Danforth, who is a respected leader in the St. Louis community) and deadlocked by the "patently unreasonable" demands of the parties. The petition is so replete with erroneous statements and omissions concerning the relevant history of the litigation and the facts and context of the settlement process as to warrant a substantial response.

Caldwell-NAACP and Liddell respondents respectfully contend that far more accurate and inclusive histories of the relevant developments in this litigation have been recounted by the court of appeals itself in its two most recent decisions concerning the remedies at issue in the petition. *See* Pet. App. at 4a-12a & n.1; *Liddell v. Board of Educ.*, 105 F.3d 1208, 1210-1212 (8th Cir. 1997), and cases cited therein. While it would be impracticable to recite this entire history here, Caldwell-NAACP respondents call the Court's attention to the following facts most relevant to this appeal, as well as to those misstatements of fact in the State's petition which have a bearing on the question of "what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2.

Background

The early history of this school desegregation litigation is recounted in several opinions of the Court of Appeals. *See* Pet. App. at 4a-12a & n.1; *Liddell,* 105 F.3d at 1210-12; *Liddell v. Missouri (Liddell VII),* 731 F.2d 1294, 1298-1301, 1304 (8th Cir.) (en banc), *cert. denied,* 469 U.S. 816 (1984); *Adams v. United States,* 620 F.2d 1277, 1281-84 (8th Cir.) (en banc), *cert. denied,* 449 U.S. 826 (1980). Significantly, the remedies approved by the courts below were predicated on findings that both the St. Louis Board of Education ("City Board") and the State were responsible for maintaining school segregation in violation of the constitutional rights of plaintiff school children. *See Liddell VII,* 731 F.2d at 1302-03; *Liddell v. Board of Educ.,* 567 F. Supp. 1037, 1052 (E.D. Mo.

1983) (approving settlement and ordering State to fund a Voluntary Interdistrict Transfer Program), *cert. denied*, 469 U.S. 816 (1984). *See also Liddell v. Board of Educ.* (*Liddell V*), 677 F.2d 626, 629 (8th Cir.) (noting prior holding that State had substantially contributed to school segregation), *cert. denied*, 459 U.S. 877 (1982); *Liddell v. Board of Educ.*, 667 F.2d 643, 654 (8th Cir.) (reaffirming recognition of causal relationship between State's actions and school segregation), *cert. denied*, 454 U.S. 1081 (1981); *Adams*, 620 F.2d at 1291, 1294 n.27 (finding State and suburban school districts had substantially contributed to school segregation); *Liddell v. Board of Educ.*, 491 F. Supp. 351, 357, 359-60 (E.D. Mo. 1980) (holding specifically that State had previously "mandated school segregation," that it "never took any effective steps to dismantle the dual system it had compelled by constitution, statutory law, practice and policy," and that it was a "primary constitutional wrongdoer" with respect to the "segregated conditions in the St. Louis public schools"), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981).

1. The Voluntary Interdistrict Transfer Program. In the phase of this litigation most relevant to this appeal, the plaintiffs and the City Board sought relief on a metropolitan-wide basis, involving suburban school districts surrounding the city of St. Louis. *See, e.g., Liddell VII*, 731 F.2d at 1299. The basis for the relief was that the defendants, along with the State, had acted in violation of the law, with the intent and effect of maintaining segregated schools and school systems on a metropolitan-wide basis. *See id.; Liddell V*, 677 F.2d at 640. Plaintiffs and the City Board sought and were permitted to add St. Louis County officials and school districts as defendants to the litigation; the district court then scheduled a hearing on plaintiffs' interdistrict claims, while at the same time encouraging the parties to settle. *Liddell VII*, 731 F.2d at

1299-1300.[1] Shortly before the scheduled hearing, and with the assistance of a court-appointed expert, the parties arrived at a settlement agreement which provided, *inter alia,* for the voluntary transfer of black students from the city of St. Louis to twenty-three County districts and of white students residing in the County to city magnet schools. *Id.* at 1300.

Following a fairness hearing conducted pursuant to Rule 23 of the Federal Rules of Civil Procedure, the district court in 1983 approved the settlement agreement and consent decree, and apportioned the costs between the City and State defendants. *Liddell,* 567 F. Supp. 1037. The State, as a non-consenting party, appealed. In 1984, the court of appeals, sitting en banc, affirmed the district court's approval of the settlement and apportionment of costs (with modifications that are not pertinent here), finding that the remedy "was closely tailored to the nature and scope of the violation" and determining that the proposed voluntary interdistrict transfer program ("VITP") met constitutional standards. *Liddell VII,* 731 F.2d at 1305-09. Significantly, the court noted a host of State constitutional and statutory provisions mandating segregation, including, *inter alia,* that

> [u]nder the segregated system, the State bused suburban black students from St. Louis County into the city's black schools to maintain the dual system. The city schools remained largely segregated until this Court's decision in *Adams.*

Id. at 1306. *See also id.* at 1305-06 & n.9. On the basis of these and prior findings in the litigation, *see, e.g., Adams,* 620 F.2d at 1291, 1294 n.7, the court concluded that

> the State's presence in public education is immense and that the State's Constitution and statutes man-

[1] The court entered this order in 1982, not 1992 as Petitioners erroneously state. (Pet. at 5.)

> dated discrimination against black St. Louis students on the broadest possible basis. It is equally clear that the discriminatory policies continued after the Supreme Court decided *Brown I* . . . in 1954. Given the breadth of the State's violation, it was appropriate for the district court to mandate an equally comprehensive remedy.

Liddell VII, 731 F.2d at 1306 (citing *Brown v. Board of Educ.,* 347 U.S. 483 (1954)). Further, relying on *Hills v. Gautreaux,* 425 U.S. 284 (1976), the court distinguished *Milliken v. Bradley (Milliken I),* 418 U.S. 717 (1974) on grounds that the "breadth, gravity and duration of the state's violation here was much greater" and that the proposed remedy did not threaten, coerce or reorganize autonomous local school districts. *Liddell VII,* 731 F.2d at 1307-08. This Court denied certiorari. 469 U.S. 816 (1984).

In the intervening years, plaintiffs began to enjoy some of the benefits of the remedies contained in the settlement agreement, while at the same time they were, and continue to be, denied the full measure of the relief to which they have been entitled under the settlement agreement and remedial orders of the courts below. As the court of appeals observed early last year, in the intervening years following the courts' approval of the settlement agreement, more than eighteen appeals were taken, "usually on questions relating to the responsibility of the State of Missouri to fund various aspects of the [remedial] plan." *Liddell,* 105 F.3d at 1211. (*See also* Pet. App. at 8a-9a.) Moreover, several of these appeals concerned, or were predicated on, delayed or deficient compliance with the remedial orders by one or more defendants. In each instance, when confronted with shortcomings in compliance, the court of appeals affirmed the validity of the remedial orders (including the funding orders) and ordered the parties to act expeditiously to achieve full compliance. *See* Pet. App. at 8a-9a (citing *Liddell v. Board of Educ.,* 882 F.2d 298, 299 (8th Cir. 1989); *Liddell v. Board of*

Educ., 873 F.2d 191, 194 (8th Cir. 1989); *Liddell VII*, 731 F.2d at 1301-09). Significantly, when confronted with evidence that VITP enrollment fell short of the 15,000 goal specified in the consent decree—a situation which continues to this day[2]—the court of appeals affirmed the obligations of the parties to reach the goal, and of the State specifically to "fund interdistrict transfers necessary to reach 15,000 students—no more, no less." (Pet. App. at 8a (citing *Liddell*, 873 F.2d at 194)). Contrary to the State's suggestion (Pet. at 6), neither the settlement agreement itself, nor the court of appeals' decisions construing it, considered the 15,000 figure as a "cap" on VITP enrollment, but rather as an achievable, and enforceable, goal. Moreover, as the court of appeals noted, on several key occasions when it could have sought this Court's review of its remedial obligations, the State did not petition for a writ of certiorari. (Pet. App. at 9a-12a.)

2. *The Unitary Status Proceedings.* The instant appeal grows out of decisions made just before and shortly after a three-week hearing in March, 1996, in which the district court received evidence concerning whether and to what extent the State defendants in this litigation had fulfilled their remedial duties to the plaintiff class. (Pet. App. at 9a-12a (detailing history of unitary status and related proceedings)). The Court convened the hearing in response to a request made by the State in October 1994, pursuant to an "Amended Motion for Unitary Status," which it filed in November, 1993. The following clarifications of the facts and procedural developments prior to the March 1996 hearing are relevant to this petition:

First, petitioners are incorrect in characterizing their unitary status request as "languishing" in the district court,

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[2] According to the most recent report filed with the district court, on November 5, 1997 there were only 12,746 transfers from city to county schools. G(2660)98, Voluntary Interdistrict Coordinating Council for the Settlement Agreement, *Fourteenth Report To The United [States] District Court Eastern District of Missouri* at 11 (Jan. 1998).

and in attempting to link the March 1996 hearing with its earlier failed attempts to obtain unitary declarations. (Pet. at 8-9.) Those petitions were brought at a time when the record in this case clearly shows the remedies had not been fully implemented: the magnet school plan, capital improvement program, *Milliken II*[3] programs, vocational educational plan, and voluntary transfer program all were either untested or incomplete. *See* Appellee City Board Br., Nos. 96-2994, 96-3630 (8th Cir. Jan. 2, 1997). For this reason, the petitions were opposed by plaintiffs and other parties as premature, and the district court agreed. The State did not appeal. (Pet. App. at 9a.) When the State renewed its request by filing the November 1993 motion, it admitted it would need up to a year to prepare its evidence, and waited nearly a year before asking the district court to set a hearing. (Pet. App. at 9a-10a.) The district court acted expeditiously (after consideration of other parties' positions) and set the hearing for September 1995—hardly an unreasonable timeframe given the complexity of the issues. The court's later postponement of the hearing until March 1996 was also not unreasonable in light of the extensive discovery and the numerous expert witnesses involved.

Second, the petition fails to disclose to this Court that just before the 1996 hearing commenced, the State itself sought to postpone, until after the unitary status proceedings, consideration of the very question that it now seeks to raise: the validity of the VITP. In January, 1996, State defendants filed in the district court a self-described "conditional" motion to vacate all orders respecting the interdistrict remedies in this case, arguing in their accompanying memorandum that the St. Louis VITP contravened this Court's decision in *Missouri v. Jenkins*, 515 U.S. 70 (1995). The State defendants asked, however, that this motion be deferred until after an adjudication of their motion for unitary status, and that the motion be

[3] *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267 (1977).

heard by the court only if the court did not find that unitary status had been attained. The State conceded at the time it was filed that its motion was not ripe. (*See* Pet. App. at 10a.)

In response to this motion, several of the parties asked the district court to decide the so-called *Jenkins* issue prior to any hearing on unitary status. G(1877)96, G(1880)96, G(1916)96. The State opposed the parties' request that the court hear the *Jenkins* issue first, arguing that "plaintiffs' motions should be denied for the simple reason that they ask the Court to do precisely the opposite of what the State requested in the Motion to Vacate. The State clearly asked that the motion be addressed *only if the State's unitary status motion is not granted.*" G(1922)96 at 2 (filed Feb. 5, 1996) (emphasis supplied).

On February 15, 1996, the district court denied the state's motion on grounds that it was not ripe and was "improvidently filed." G(1939)96 at 1. In this same order, the court also considered requests by the plaintiffs and the United States for postponement of the hearing and appointment of a settlement coordinator. The district court indicated that while it would proceed with the hearing, it "agreed with plaintiffs that the best resolution of this case would be an agreed-upon plan for ending Court supervision of the St. Louis Public Schools," and noted that it might appoint a settlement coordinator at the conclusion of the trial when prospects for settlement might be greater. (Pet. App. at 10a (quoting G(1939)96 at 2)). State defendants did not appeal this order denying their *Jenkins* motion and placing the parties on notice that the trial court preferred to have the litigation concluded via a settlement.

Finally, in connection with the unitary status hearing, the State has misled this Court by making assertions that not only were never adopted as findings by the trial court, but were vigorously contested by the respondents and other parties both at the hearing and thereafter. The uni-

tary status hearing lasted three weeks and was preceded by extensive discovery. Thousands of pages of exhibits were involved, and numerous witnesses, including experts, were called by the various parties. For example, the Caldwell, Liddell and United States plaintiffs alone called six expert witnesses, each of whose testimony challenged in significant respects the State's contentions that the St. Louis Public Schools were unitary and that the State should be relieved of further remedial obligations. The State's misstatements in connection with matters at issue at the hearing include the following:

(a) The State makes numerous representations throughout the petition concerning the costs of desegregation programs and concerning other educational expenditures in St. Louis and elsewhere in the State of Missouri. (*See, e.g.*, Pet. at 2, 3, 8, 21 & App. at 25a-30a.) Extensive testimony, including expert testimony, by various parties at the March, 1996 hearing was devoted to funding issues. Plaintiffs and the City Board contested at the time, and continue to contest many of the State's contentions concerning these issues.[4] There has been no adjudication of these or any other facts which fully with court orders and to eradicate, to the

(b) Similarly, the State also proffers as "undisputed fact" that "St. Louis currently has no racially

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[4] For example, the State claims that in 1994-95, the St. Louis Public Schools spent $8,132 per pupil, while most school districts in the rest of the State spent $4,553 per pupil. The State also claimed in its petition, filed on November 25, 1997, that 1994-95 was the "most recent year for which the Missouri Department of Elementary and Secondary Education (DESE) has comprehensive data available." (Pet. at 8.) Yet, a search of the DESE data base on the Internet reveals that data is available through and including the 1996-97 school year, and that in 1994-95, according to these same State defendants, St. Louis Public Schools spent $7,218.58 per child, while the State average was $4,972. http://services.dese.mo.us/schooldata/1995/15115/finanone.html.

discriminatory practices, policies or procedures in any area of school operations." (Pet. at 9.) To the contrary, plaintiffs and other parties offered extensive testimony concerning the failure of both City and State defendants to comply fully with court orders and to eradicate, to the extent practicable, the vestiges of the *de jure* system. Again, there has been no finding, one way or the other, by the trier of fact.

3. Settlement Negotiations. A month after the conclusion of the hearing, and before the transcript was complete and a post-trial briefing schedule established, the district court, on its own motion, ordered the appointment of Dr. William H. Danforth [5] as Settlement Coordinator, indicating that "the Court believes a serious settlement effort . . . should be undertaken at this time." G(2062)96, Memorandum and Order of April 23, 1996. The court also stated, for the second time in less than three months, its belief that the best resolution of the litigation would be a settlement "ending Court supervision of the St. Louis Public Schools." *Id.* This order also spelled out the duties and authority of the Settlement Coordinator, ordered counsel and parties to "attend all meetings as requested by the Settlement Coordinator" and to "participate in good faith," stayed the post-trial briefing schedule, and clarified that "during settlement negotiations, all components of

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[5] Dr. Danforth is the former Chancellor and current Chairman of the Board of Washington University in St. Louis. Prior to his appointment as Settlement Coordinator, he had served as chair of a committee of St. Louis area business leaders which studied the court-ordered desegregation programs and sought to provide the court, through court-appointed *amicus*, with a "detailed, impartial analysis of the desegregation plan," including recommendations for steps to be taken to preserve the benefits to the community while at the same time achieving "the goal of ultimately returning the school district to local control." G(1901)96. *See also* G(1881)95, App. A, Report of the Civic Progress Task Force on Desegregation of the Public Schools (Nov. 27, 1995).

the Settlement Agreement now in force shall continue as they are currently operating." *Id.*

Following Dr. Danforth's appointment, the State, through an incessant barrage of motions and stay applications in the district court, in the court of appeals, and in this Court (directed to Justice Thomas as Circuit Justice), sought to circumscribe the authority of the settlement coordinator, to truncate and denigrate settlement negotiations, and to obtain court orders terminating portions of the remedy in advance of the requisite judicial findings. These efforts were rejected by the courts at every turn and are accurately described by the court of appeals. Pet. App. at 11a-12a; *Liddell,* 105 F.3d at 1211-12. At the same time, the court of appeals endorsed the court-ordered settlement negotiations (Pet. App. at 13a-16a), while affirming the broad discretion of the trial court to control its docket and to maintain existing remedies while negotiations take place. *Liddell,* 105 F.3d at 1212.

Unfortunately, however, the State has sought in its petition to portray the settlement process as a sham and the Settlement Coordinator as "an outspoken advocate of interdistrict busing" who has done no more than "initiate[] but a handful of meetings over 19 months." (Pet. at 9-10. *See also* Pet. at 26-29.) Although the district court has ordered the parties to maintain confidentiality in the negotiations themselves, respondents are permitted to cite the following developments in the settlement process, which are a matter of public record:

(a) Contrary to the State's petition, Dr. Danforth has convened more than a "handful of meetings" since his appointment as settlement coordinator. While only a limited number of large group meetings involving all the parties' counsel have been convened, Dr. Danforth has initiated or sanctioned numerous other meetings and discussions among the many parties to the litigation, including the State.

(b) Dr. Danforth has enlisted the *pro bono* assistance of two highly respected lawyers in the St. Louis community who have also participated in numerous discussions and meetings with the parties and others. He has also involved others in the discussions, including court-appointed experts and committees, and school superintendents in the St. Louis area. He has secured the assistance of fiscal and other experts, as well as researchers from Washington University, St. Louis University, State agencies and elsewhere in the State. In these and other undertakings, Dr. Danforth and his staff have sought to narrow differences among the parties on the numerous, complex issues involved in reaching an agreement. These issues have included: current educational and desegregation expenditures; revenue and taxation; school construction; maintenance and capacity; transportation, and educational programs. In respondents' view, these efforts, which are ongoing, have been largely successful to date.

(c) Dr. Danforth has also sought to facilitate a political consensus in the state of Missouri which would pave the way for a lasting settlement and an end to court supervision. In this connection he has testified before and worked closely with a bipartisan joint committee of the State Legislature on desegregation, which was convened for this purpose. Dr. Danforth's brother, former United States Senator John Danforth, has also volunteered and lent his support to these efforts. While respondents do not know what the outcome will be, they anticipate that the legislature shortly will consider comprehensive legislation proposed by this Joint Committee and designed to foster conditions for a lasting settlement and an end to court supervision. *See* Senate Bill 781

(Mo. 1998); http://www.senate.state.mo.us/comm/minutes/deseg/main.htm. In 1996, the committee held several hearings in various parts of the state and received testimony from a wide variety of constituencies (including plaintiffs, the City Board, school districts, parents, teachers and others), as well as experts, and issued a report in December, 1997 which formed the basis for the legislation. *See* Missouri General Assembly Final Report of the Joint Interim Committee on School Desegregation and Finance (Dec. 1997).

(d) Finally, in encouraging the parties to come to agreements, Dr. Danforth has facilitated an interim settlement between the Caldwell-NAACP and Liddell plaintiffs and the City Board defendants. This agreement, announced after the State filed its petition, provides for a modification of certain "*Milliken II*" remedies, termination of intradistrict remedies the plaintiffs and the City Board have agreed have been ineffective in eliminating the vestiges of segregation in city schools, and their replacement—at no additional cost to the State or the City Board—with initiatives designed to improve schools' accountability and to strengthen professional development for teachers in racially isolated schools. The parties have agreed to ask Judge Gunn for the approval needed to implement these provisions. Moreover, both the plaintiffs and the City Board are continuing to negotiate a comprehensive settlement and end court supervision over intradistrict remedies. While negotiations are still proceeding on these larger issues, respondents are optimistic that the interim agreement concluded earlier this month will form the basis for a larger agreement to end this litigation.

The State has further sought to portray plaintiffs as collusive and unreasonable, alleging, *inter alia*, that

> this entire proceeding has been collusive between the plaintiffs and their school district allies, and none of the courts below (and certainly not the parties who have benefitted financially at the State's expense) has any interest in facilitating achievement of the end goal of all desegregation cases—the return of local schools to the control of local governing bodies operating in compliance with the Constitution.

(Pet. at 26-7.) The record in this case, however, contains no support for such hyperbolic and provocative assertions. At no point during this litigation has a court below made any findings, or considered any credible evidence that plaintiffs "colluded" with the City Board defendants, or otherwise worked with those defendants in an impermissible manner. To the contrary, in approving the underlying settlement agreement pursuant to Rule 23, the district court specifically found an absence of collusion. *Liddell*, 567 F. Supp. at 1045.

Nor is there any support in the record, or in fact, for the State's claims that a negotiated settlement will not be possible because the respondents have made "patently unreasonable demands." (Pet. at 28.) The only support proffered by the State—its characterization of testimony of plaintiffs' lead counsel at a state legislative committee hearing—is inaccurate. (Pet. at 10, 28.) At no time has plaintiffs' counsel "stated categorically that there will be no settlement" unless there is a guaranteed "increase in State funding to the [St. Louis Public Schools] to $9556 per pupil per year." (Pet. at 10.) To the contrary, the testimony referred to by the State describes the desires of these respondents to avoid increases in costs, to defund ineffective programs, and to work cooperatively with other parties, including the State legislative branch, to reach a lasting settlement to this litigation. Transcript of Hearings of Missouri Joint Interim Committee on School De-

segregation and Finance Issues at 317-342 (Oct. 7, 1997) and 32-81 (Nov. 5, 1997).

Finally, respondents note that at no time since his appointment as the settlement coordinator has Dr. Danforth declared, or been petitioned by the State to declare, that an "impasse" exists among the parties. (Pet. at 12.) Nor has the State sought a determination by Dr. Danforth, or by the district court to whom he reports, that respondents have not complied with the court's order to negotiate in good faith or that they have colluded or otherwise acted improperly. (*See* Pet. at 28-29.) The parties, including the Attorney General, have continued to meet, to talk, and to make proposals. The *fact* is that these activities have continued to date under the aegis of the court-appointed settlement coordinator. Indeed, in November, the same month in which the State filed its certiorari petition, the Attorney General also wrote to the parties and made a public statement declaring his support for the settlement process. Dale Singer, *Nixon withdraws offer on desegregation settlement,* St. Louis Post-Dispatch, Nov. 7, 1997 ("I look forward to hearing settlement offers from the others involved in the case. I will work with the court-appointed settlement coordinator to reach a resolution to the case that is in the best interest of the children.") (statement of Missouri Attorney General Jay Nixon). *See also* Letter to Counsel from Jay Nixon and John R. Munich of Nov. 7, 1997.

The Decision of the Court of Appeals

Just as petitioners have mischaracterized the facts and prior proceedings and the settlement negotiations in this case, they have misstated the holding of the court of appeals.

The court of appeals did *not* "rule[] that the district court had properly declined to phase out the interdistrict busing program [sic] because *Jenkins III* does not cast doubt on the propriety of imposing interdistrict remedies

to address intradistrict violations." (Pet. at 11.) As more fully discussed *infra,* nothing the court of appeals said in its opinion even created an inference of such a holding.

Rather, the court, after a brief description of the background of the case including the barrage of motions filed by petitioners attacking the settlement process (Pet. App. at 4a-11a), did the following: First, it held that the district court did not abuse its discretion in keeping the existing remedy in place while settlement negotiations were ongoing. In doing so, the panel noted the principles of law favoring settlement, particularly in school desegregation cases, and the factors supporting the district court's exercise of equitable discretion to permit the remedies to continue while negotiations took place. (Pet. App. at 13a-16a.) The opinion also rejected petitioners' claim of an "impasse" as without factual basis (Pet. App. at 13a.)

Second, in dicta, the court provided some guidance to the district court on what factors, in the light of this Court's decisions, should govern the district court in making a decision on unitary status if it determines that "an impasse in the settlement negotiation has been reached." (Pet. App. at 16a-18a.)

Finally, responding to petitioners' claim that this Court's decision in *Jenkins* left the district court no option but to terminate the VITP immediately, the court pointed out relevant differences between that case and this, notably the fact that the existence of an interdistrict violation had never been litigated in St. Louis. The court added that the initial determination of an interdistrict violation would properly be made by the district court and that it would be unfair to plaintiffs "if they were denied the opportunity to prove interdistrict violations," should negotiations fail and it were decided that such proof was necessary to sustain the VITP. (Pet. App. at 19a-21a.) Without reaching a decision on the ultimate issues, and in light both of

prior decisions upholding the duty of the State to fund the VITP and of the ongoing settlement negotiations concerning the VITP and other remedies, the court concluded that *Jenkins* did not mandate termination or phase-out of the VITP and of the ongoing settlement negotiations concern- cited in Pet. App. at 4a-5a n.1.

SUMMARY OF ARGUMENT

Petitioners should not be permitted through this petition to short-circuit the settlement process initiated by the district court. Their demand for review cannot be squared with legal principles that vest broad discretion in trial courts to manage their own dockets and that strongly favor settlement in school desegregation cases and other litigation of this magnitude. *See, e.g., Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 921 F.2d 1371, 1383 (8th Cir. 1990). Petitioners' contention that settlement talks are at an impasse is not supported by either the settlement coordinator or the trial judge and is contradicted by petitioners' own contemporaneous statements treating the settlement talks as a live process.

Further reasons for denial of the petition include the fact that the remedy sought—refusing entry into the interdistrict desegregation program for the 1997-98 school year—is now moot since students have been enrolled and are attending school. Nor does this come within an exception to the mootness rule: a properly presented claim for termination of the program would not evade future review.

Petitioners have also failed to meet this Court's basic criteria for grant of certiorari. However the underlying issues may be characterized, the decision below contemplated further proceedings and did not resolve an issue of national importance. Nor does the case present any conflict between circuits. Petitioners' transparent effort to

manufacture such a conflict depends entirely on mischaracterizing and distorting the holding of the court of appeals. That court below has continually recognized and acted in accordance with the controlling authority of *Milliken v. Bradley (Milliken I)*, 418 U.S. 717 (1974), and did *not* rule that interdistrict remedies could be imposed in the absence of an interdistrict violation. Rather, the court properly recognized that it would be inappropriate for an appellate court to make an initial determination concerning the existence of an interdistrict violation and set forth an orderly process for resolving the question.

By denying the petition, this Court will give the settlement process an opportunity to work and insure that if it fails the process for adjudicating unresolved legal issues will be orderly and fair.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

I. CERTIORARI SHOULD BE DENIED BECAUSE THE PETITION PREMATURELY SEEKS TO TERMINATE COURT-ORDERED SETTLEMENT NEGOTIATIONS ON A KEY COMPONENT OF THE CURRENT REMEDY.

Virtually from the moment that the district court appointed a settlement coordinator in an effort to resolve the remaining issues in this case through negotiations, petitioners have sought to short-circuit the settlement process. They have unsuccessfully challenged the objectivity of Dr. Danforth, the settlement coordinator, an effort renewed here; treated their own evidence offered at the hearing on unitary status as conclusive; and have sought to have the courts below unilaterally terminate the remedy without any further proceedings. (*See* Statement, *supra* at 8-11.) In their current request for certiorari, petitioners seek to resurrect a motion to invalidate the remedy that they had earlier asked the district court to consider *only after* a determination is made on unitary status. (*See* Statement, *supra* at 7-8.)

All of these efforts run afoul of the strong preference that the law accords to the voluntary settlement of civil litigation. *Williams v. First Nat'l Bank,* 216 U.S. 582, 595 (1910). As the court below found, the preference for resolution through settlement may be particularly strong in school desegregation cases, which are often protracted and divisive and in which lasting solutions depend on the cooperation of all the parties. (*See* Pet. App. at 13a-14a.) *See also Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1,* 921 F.2d 1371, 1383 (8th Cir. 1990); *Armstrong v. Bd. of School Dirs.,* 616 F.2d 305, 313 (7th Cir. 1980); *Parents for Quality Educ. with Integration v. Fort Wayne Community Schs. Corp.,* 728 F. Supp. 1373, 1374 (N.D. Ind. 1990); *Bronson v. Board of Educ.,* 604 F. Supp. 68 (S.D. Ohio 1984).

The authority of district courts to initiate a settlement process and to effectively stay further litigation pending the outcome of the negotiations is part of the court's broad discretion over case management which includes "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.,* 370 U.S. 626, 630-31 (1962).

Petitioners seek to avoid the dispositive effect of these principles on their request for review by proclaiming that the negotiations have reached an impasse, a conclusion they reach by misstating the position of respondents (*see* Statement, *supra* at 15-16) and characterizing them as making "patently unreasonable demands." (Pet. at 28-29.) As the court of appeals correctly pointed out, this assertion of an impasse was not supported by any finding of the settlement coordinator or the district court and was contradicted by the other parties. (Pet. App. at 13a.)

Since the court of appeals decision on September 25, 1997, two events have further undermined petitioners' claim of an impasse. On January 5, 1998 the Caldwell and Liddell plaintiffs and the City Board defendants an-

nounced a joint agreement to redeploy resources used for educational improvement, including provisions to reconstitute schools where students were failing to make progress. (Statement, *supra* at 13.) The agreement was reached after months of negotiations conducted under the aegis of Dr. Danforth, the settlement coordinator. The parties also announced that they would make further efforts to supplement the agreement so that it might be incorporated into a more comprehensive order.

Equally as important, in November, 1997, petitioners wrote to the other parties soliciting their proposals for settlement and stating a determination to work with the court-appointed settlement process to resolve the case. (Statement, *supra* at 15.) The Attorney General also announced his position publicly. (*Id.*) There can be no doubt that these statements treated the settlement discussions as a live and ongoing process. Petitioners' unilateral declaration of an impasse in a certiorari petition filed the same month totally contradicts their own statements and is not credible.

II. CERTIORARI SHOULD BE DENIED ON GROUNDS OF MOOTNESS BECAUSE THE ACT SOUGHT TO BE ENJOINED BY PETITIONERS HAS ALREADY OCCURRED.

The motion filed by petitioners was quite specific. As the court of appeals said, the State "appeals from an April 10, 1997 order of the [district court] . . . denying the State's motion to end all efforts to recruit and admit new students into the voluntary interdistrict transfer plan (VITP) *for the 1997-98 school year.*" (Pet. App. at 4a) (emphasis supplied). So, too, the order of the court of appeals was specific: "we affirm the order of the district court denying the State's motion to end all efforts to recruit and admit new students into the VITP *for the 1997-98 school year.*" (Pet. App. at 21a) (emphasis supplied).

Federal court jurisdiction requires, of course, that at all stages of adjudication including appellate review there

must be an actual, live controversy in which the parties have a legally cognizable interest in the outcome. *See, e.g., Honig v. Doe,* 484 U.S. 305, 317 (1988); *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 397 (1980). This Court requires that a live controversy exist at the time the case is before it, not just at the time of filing. *See, e.g., DeFunis v. Odegaard,* 416 U.S. 312, 319 (1974); *Board of License Commr's v. Pastore,* 469 U.S. 238 (1985) (per curiam). *See also,* Erwin Chemerinsky, *Federal Jurisdiction* § 2.5.1 at 125 (2d ed. 1994).

Where, as here, the relief sought is an injunction, the mootness doctrine requires a court to ask whether the act sought to be enjoined already has occurred. *See* Robert L. Stern et al., *Supreme Court Practice* 712 (6th ed. 1986). So, for example, an effort to enjoin the holding of an election will become moot once the election is held. *Hall v. Beals,* 396 U.S. 45, 48 (1969) (per curiam) (finding that because the election has been held "[t]he case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law"). That is precisely the situation here. Once new students were admitted and began attending school in the voluntary interdistrict transfer program, the relief sought by petitioners' could no longer be afforded and the case lost its character as a present, live controversy.

Nor does this case come within the exception to the mootness doctrine as presenting an issue that is capable of repetition but evades review. As petitioners make plain throughout their request for certiorari, their ultimate objective is not simply to end the entry of new students into the voluntary transfer program but to terminate the program in its entirety on grounds that it has been rendered invalid by a change in decisional law. Why petitioners chose to limit their request for relief to new entrants is a matter on which other parties can only speculate. The important point is that the underlying issue will not evade review. Petitioners may appropriately raise it anew if

settlement efforts fail and, if they do so, there will be no mootness bar to its consideration by appellate courts.

III. THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT MEET THE COURT'S BASIC CRITERIA FOR GRANT OF CERTIORARI.

This Court generally limits the exercise of its discretionary jurisdiction to the following situations: (1) the case involves an important question, (2) the case permits the court to resolve a circuit split, (3) the case would resolve a dispute between federal and state courts, or (4) the case implicates a matter affecting national interests. *See* Sup. Ct. R. 10; *Forsyth v. Hammond*, 166 U.S. 506, 513-515 (1897); Charles Alan Wright et al., 17 *Federal Practice and Procedure* § 4034 (2d ed. 1988). The petition in this case meets none of the criteria.

A. There Is No Conflict Among the Circuits.

Apparently aware of the need to state a credible basis for this Court's review, petitioners seek to manufacture a conflict among circuits by claiming that the Eighth Circuit is the only circuit not to recognize the need for an interdistrict violation as a predicate for an interdistrict remedy (Pet. at 23.) In order to create such a conflict, petitioners claim that the Eighth Circuit ruled that "an interdistrict violation is not a prerequisite for interdistrict relief." (Pet. at 13.) Such a holding would create a conflict with this Court's holding in *Milliken v. Bradley (Milliken I)*, 418 U.S. 717 (1974).

But petitioners' claim is a complete fabrication; one searches the opinion below for anything approximating such a holding.[6] In fact, what the opinion below did do

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[6] It would be most curious if the court below were to repudiate *Milliken I* in any way since both the panel and the full circuit have consistently recognized the authority of *Milliken* in all prior stages of this litigation. *See, e.g., Liddell v. Missouri (Liddell VII)*, 731 F.2d 1294, 1304 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 816

(in response to the petitioners' claim that *Jenkins* required immediate termination of the remedy) was to set out some of the material differences between the *Jenkins*[7] case and this case, noting in particular that in *Jenkins* there was a federal judgment that no interdistrict violation had ever occurred, while in this case such a determination had never been made because of the settlement and subsequent consent decree. (Pet. App. at 19a-21a.)[8] If a change in the decisional law operates to invalidate or impair the original settlement agreement and orders, the court below suggested that plaintiffs would be entitled to litigate their interdistrict claims. It would be inappropriate, the court of appeals wrote, "for this court to make an initial determination with respect to [the existence of] an interdistrict violation." (Pet. App. at 19a.) This is a far cry from a holding that an interdistrict remedy need not be predicated on an interdistrict violation.

Petitioners then seek to counter the need for a trial court hearing on the existence of an interdistrict remedy; they suggest that twelve years is long enough and that the parties have no due process right to retain State funding. (Pet. at 18.) This argument too misses the point. Assuming, *arguendo* that the petitioners present a valid claim under Federal Rule of Civil Procedure 60(b), the Court would apply equitable principles in resolving the case. *See Associates Discount Corp. v. Goldman*, 524 F.2d

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(1984); *Liddell v. Board of Educ.*, 677 F.2d 626, 641 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982); *Adams v. United States*, 620 F.2d 1277, 1294 n.27 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 826 (1980).

[7] *Missouri v. Jenkins*, 515 U.S. 70 (1995).

[8] The settlement among all parties except the State defendants was entered as a consent decree after a fairness hearing. *Liddell v. Board of Educ.*, 567 F. Supp. 1037 (E.D. Mo. 1983). State defendants were included in the remedy based on prior findings concerning constitutional wrongdoing and on the Eighth Circuit's reading of this Court's decision in *Hills v. Gautreaux*, 425 U.S. 284 (1976). *Liddell VII*, 731 F.2d at 1305-09. This Court denied review. 469 U.S. 816 (1984).

1051, 1054 (3d Cir. 1975) ("It is clear that equitable principles apply to the resolution of the issue in 60(b) cases."); *DiVito v. Fidelity Deposit Ins. Co.*, 361 F.2d 936, 939 (7th Cir. 1966) ("the relief provided by Rule 60(b) is equitable in character and to be administered upon equitable principles"); Wright, *supra* § 2857 at 255.

One of those equitable principles is that if two possible bases exist for an injunction, even if the stated ground for the injunction is invalidated, the alternate ground may support continuance of injunctive relief. *See Sunbeam Corp. v. Charles Appliances, Inc.*, 119 F. Supp. 492 (S.D.N.Y. 1953). So, even if petitioners persuaded the district court that a change in the decisional law undermined the original injunction, proof of an interdistrict violation would support the continuance of injunctive relief.[9]

Moreover, the decision of this Court in *Dayton I* strongly supports a decision that would keep injunctive relief in effect while hearings are held to determine whether there is an adequate alternate basis for relief (*i.e.*, an interdistrict violation). As Justice Rehnquist wrote for the Court, after finding that the basis proffered for a comprehensive school desegregation remedy by the courts below was inadequate, "we think that the plan finally adopted by the District Court should remain in effect for the coming school year subject to such further orders of the District Court as it may find warranted following the hearing mandated by this opinion." *Dayton Bd. of Educ. v. Brinkman (Dayton I)*, 433 U.S. 406, 421 (1977). *Accord, United States v. School Dist. of Omaha*, 565 F.2d 127, 128 (8th Cir. 1977) (per curiam).[10]

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[9] Not one of the cases cited by petitioners (Pet. at 18-19) to bolster their position that the court below should have summarily vacated the injunction holds or even hints that plaintiffs have no right to litigate their claims or that a court ought not to consider alternative bases for injunctive relief.

[10] At a minimum, the courts below would apply equitable considerations such as the likelihood that plaintiffs would prevail and the gravity of irreparable harm asserted by the parties. In a hearing

In sum, far from issuing "sweeping orders" or defying this Court's decision in *Milliken I*, the Court below issued a careful, nuanced opinion setting forth proper procedures for the adjudication of claims that may remain after the settlement process is completed. The decision created no division in the circuits.

B. There Is No Other Basis for a Grant of Certiorari.

Petitioners do not explicitly invoke any of the other bases for a grant of certiorari. It may be inferred that their plea for a vindication of "federalism and separation-of-powers concerns" (Pet. at 26) is intended to suggest that this case implicates a matter affecting national interests.[11] But these arguments, like petitioners' claim that there is a circuit split, are predicated on a total mischaracterization of the holding of the court below. It is conceivable that an important question regarding the responsibility of the State may arise in the future. But such a question would properly occur only if the case is not set-

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held by the district court the State could appropriately document its passionate argument that "staggering" costs of the remedy impose irreparable harm on petitioners (Pet. at 21-22), outweighing any continuing harm to black school children stemming from the State's imposition of unconstitutional segregation for more than a quarter of a century after the *Brown* decision. *See Liddell v. Board of Educ.*, 491 F. Supp. 351, 357, 359-60 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981). The State can also seek in that proceeding to document its claim that the vestiges of segregation have been eliminated by the interdistrict remedy adopted in 1984 and that desegregation is no longer needed. All of these claims would be properly weighed along with the claims of other parties.

[11] Petitioners' arguments in this section (Pet. at 26-30) are a grabbag of non sequiturs and misstatements. They invoke the "vital national tradition of local autonomy of school districts" (Pet. at 27) without acknowledging that all of the school districts in the case oppose the State's effort to terminate the remedy. They baldly and falsely assert collusion between plaintiffs and school districts (Pet. at 26) without acknowledging that no such finding has ever been made and that at the fairness hearing the district court explicitly noted that no party or objector made any claim of collusion. (Statement, *supra* at 14.)

tled and after determinations by the courts below concerning the applicability to this case of *Hills* as interpreted by *Jenkins* and the existence of an interdistrict violation.

CONCLUSION

With a court-ordered settlement process that is well underway, and with important factual determinations still to be made if settlement negotiations fail, this is a most appropriate case for application of the principles of *Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955). Because of its "proximity to local conditions," the trial court can best perform the judicial functions called for at this stage of the proceedings. There is no reason at this point to doubt that the outcome will be marked by a "practical flexibility" and a "facility for adjusting and reconciling public and private needs." *Id.* at 298-99.

For the reasons stated above the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM DOUTHIT
P.O. Box 6961
Chesterfield, MO 63006-6961
Attorney for Respondents Michael Liddell, et al.

WILLIAM L. TAYLOR *
DIANNE M. PICHE
LAW OFFICES OF
WILLIAM L. TAYLOR
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 659-5565

MICHAEL A. MIDDLETON
1901 Fairview Road
Columbia, MO 65203
(573) 882-3423
Attorneys for Respondents Earline Caldwell, et al., and The National Association for the Advancement of Colored People

January 28, 1998

* Counsel of Record